wrong in holding that he was driving without due consideration for other road users, I am for the reasons which I have stated satisfied that he could not on the evidence have reached any other conclusion.

The appeal as regards conviction must therefore be dismissed. No ground was put forward before me that the fine was in any way excessive. Whilst it is doubtful having regard to the petition of appeal whether the appellant was appealing against his sentence as well I have considered this matter, and I see no reason for interfering with the sentence. It cannot, in my opinion, be said that a fine of $40 imposed was in any way excessive.

Appeal dismissed.

Solicitors: *Drew & Napier.*

PUBLIC PROSECUTOR v. ROSS

[A.Cr.J. (Ismail Khan J.) July 15, 1961]

[Seremban — Criminal Appeal No. 3 of 1961]

Machinery — Operation of rubber sheeting machine — No certificate of fitness — Machinery Ordinance, 1953, s.6(1) and (2) — Notice under s.6(2) — Mens rea.

In this case a weeder who was feeding rubber into the rollers of a rubber sheeting machinery sustained injuries on his fingers. There was no certificate of fitness issued in respect of the said machinery as required by section 6(1) of the Machinery Ordinance. The respondent, the manager of the rubber estate, was charged with contravening section 6(1) an offence punishable under section 35 of the said Ordinance.

Held: (1) to attract the operation of section 6(1) it is not necessary that a notice should have been issued under section 6(2) of the said Ordinance;

(2) the prohibition contemplated by section 6(1) of the Ordinance is an absolute one and there is no obligation on the prosecutor to prove *mens rea.*

Cases referred to:—

(1) *Mousell Bros. Ltd.* v. *London and North Western Railway Co.* [1917] 2 K.B. 836, 845.

(2) *Ong Aik Phow* v. *Rex* [1937] M.L.J. 73.

(3) *R.* v. *G.H. Kiat* [1938] M.L.J. 150.

(4) *Public Prosecutor* v. *Ong Cho Teck* [1946] M.L.J. 85.

CRIMINAL APPEAL.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the appellant.

Atma Singh Gill for the respondent.

Ismail Khan J.: The respondent was charged before the learned Magistrate, Port Dickson, as follows:—

"That you on 24th day of October, 1960 at about 12.00 noon being the Manager of Sengkang Rubber Estate, Port Dickson, in the State of Negri Sembilan did permit a continuous rubber sheeting machine which is a machine for which a certificate of fitness is prescribed to be operated without such certificate of fitness being in force contrary to section 6(1) of the Machinery Ordinance, No. 18 of 1953 and punishable under section 35(1) of the aforesaid Ordinance."

The learned Magistrate acquitted and discharged the respondent without calling for the defence as there was no evidence that the respondent had permitted the machine to be operated or had knowledge that it was being operated. Against this acquittal the Public Prosecutor has appealed on the ground that the learned Magistrate was wrong both in law and in fact in holding that there was insufficient evidence that the respondent had permitted the machine to be operated.

The facts are that on 24th October, 1960, at a rubber factory on the Sengkang Rubber Estate, of which the respondent was the manager, a rubber sheeting machinery was being operated by an employee of the estate P.W.2, an engine driver, with the assistance of P.W.1, a weeder, who was feeding rubber into the rollers of the machine. During the operation P.W.1 sustained injuries to his fingers. According to P.W.3, a machinery assistant, there was no certificate of fitness issued in respect of the said machinery on the said date. Indeed, there was no such certificate as from 5th October, 1959. The principle to be followed in this case is stated by Atkin L.J. in *Mousell Bros. Ltd.* v. *London and North Western Railway Co.*[1], at page 845:—

"I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

The same principle has been adopted in the following cases: — *Ong Aik Phow* v. *Rex* [2], *Rex* v. *G.H. Kiat* [3], *Public Prosecutor* v. *Ong Cho Teck* [4].

Section 6(1) of the Machinery Ordinance reads as follows:—

"No owner or other person, without the authority in writing of a Senior Inspector, shall operate or permit to be operated any machinery in respect of which a certificate of fitness is prescribed unless such certificate has been duly issued, and is in force."

Section 35(1) reads as follows:—

"Any person who shall contravene the provisions of section 6, sub-section (1) of section 13, section 14, sub-section (3) of section 15, sub-section (1) of section 17, section 25, or section 34 shall be liable to a fine of two thousand dollars and any person who shall contravene the provisions of section 8, section 9, sub-section (1) of section 15, section 28 or section 29 shall be liable to a fine of one thousand dollars and any person who shall contravene any other provision of this Ordinance for which contravention no penalty is provided shall be liable to a fine of five hundred dollars and in the case of a continuing offence to a fine of twenty-five dollars for each day or part of a day during which the offence continues after the first day on which a conviction is had."

Section 6(2) empowers an inspector of machinery to issue a notice prohibiting the operation of the said machinery until a certificate of fitness is issued. It is not however necessary to attract the operation of section 6(1) that such

a notice should have been issued, as the object of issuing the notice is to ensure that the machinery is not operated as a precaution against the danger arising from the operation of defective machinery or absence of safety appliances.

It is clear that the prohibition contemplated by section 6(1) of the Ordinance is an absolute one and there is no obligation on the prosecution to prove *mens rea*. As Terrell J. observed in the case of *Rex* v. *G. H. Kiat* "the absolute prohibition.....is justified by the consideration that the strictness of the rule is necessary for the public benefit and protection. A master is the only person in a position to control his servant and accordingly the owner is made responsible for the acts of his servant whether or not such servant has carried out his master's instructions."

In this case there was evidence at the close of the prosecution case that:—

(1) on the day in question a rubber sheeting machinery was being operated by P.W.2, an engine driver, an employee of the estate. According to P.W.2 the rollers work by means of a belt operated by a fuel engine, a description coming under the definition of machinery set out in section 2 of the Ordinance;

(2) no certificate of fitness had been issued in respect of such machinery on the said date;

(3) the respondent was the manager of the estate.

In my view a *prima facie* case has been made out by the prosecution which if unrebutted would have warranted a conviction.

I will therefore allow the appeal. This case is to be remitted to the Magistrate's Court, Port Dickson, with a direction that the defence be called.

Appeal allowed.

MOHAMED SALLEH v. PUBLIC PROSECUTOR

[A. Cr. J. (Neal J.) July 17, 1961]

[Ipoh — Criminal Appeal No. 49 of 1961]

Road Traffic — Confiscation — Road Traffic Ordinance, 1958, s.92(2) and (4).

The appellant was convicted of offences under sections 92(1) and 74(1) of the Road Traffic Ordinance and fined. He was also disqualified for 12 months and the car was confiscated. On appeal on the question of confiscation under section 92(4),

Held: the operation of section 92(4) is limited to vehicles that have been seized by any Road Transport Officer (defined in the Ordinance) and the direction is to make either an order for forfeiture or for release. If there is a prosecution then on a proper application permission is extended to the Court to make either of those orders provided there has been a seizure even though that prosecution has not been successful. The *dicta* of Ong J. in *Gun Kim Luu* v. *Public Prosecutor* (1) not followed.*

Case referred to:—

(1) *Gun Kim Luu* v. *Public Prosecutor* [1961] M.L.J. 35.

* See the last paragraph of Ong J.'s judgment in *Gan Chye Huat* v. *Public Prosecutor*, post, p. 27 at p. 28.

CRIMINAL APPEAL.

S. A. Lingam for the appellant.

Syed Othman (Deputy Public Prosecutor) for the respondent.

Neal J.: The appellant was convicted of offences against section 92(1) of the Road Traffic Ordinance, 49 of 1958 and section 74(1) of the same Ordinance. On the first charge he was fined $150 in default one month's imprisonment; on the second charge he was fined $75 in default two weeks' imprisonment. The appellant was also disqualified from holding a driving licence for 12 months and the car was ordered to be confiscated.

Before me the appeal was limited to the question of confiscation of the motor car.

In his grounds of judgment the Circuit Magistrate, Batu Gajah, relied upon the judgment of Ong J. in *Gun Kim Luu* v. *Public Prosecutor* (1) at page 36 when the learned Judge said:

"I would add a few remarks in connection with this case. The learned Magistrate appears to have overlooked the provisions of section 92(4) of the Road Traffic Ordinance. In my view, a conviction under section 92(1) leaves no option for him but to confiscate the vehicle, and I would draw the attention of all Magistrates to this point."

On the hearing of the appeal the Deputy Public Prosecutor drew my attention to the wording of sub-section (4) of section 92 and intimated that having regard to the wording thereof he found difficulty in supporting the order of confiscation notwithstanding the remarks of Ong J. to which I have referred. The relevant sub-section reads:

"An order for the forfeiture or for the release of any motor vehicle seized under the provisions of sub-section (2) shall be made by the Court before which the prosecution with regard thereto has been held, and an order for the forfeiture of such vehicle may be made if it is proved to the satisfaction of the Court that an offence against this section has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence."

After consideration I found myself in agreement with the interpretation placed upon sub-section (4) by the Deputy Public Prosecutor and I allowed the appeal to the extent of setting aside the order of confiscation. As I found myself unable, with respect, to agree with the remarks of Ong J. to which I have referred, I intimated that I would give my reasons in writing.

As I interpret sub-section (4) its operation is in the first place limited to vehicles which have been seized by any Road Transport Officer as defined in the Ordinance, and there was no evidence in the record to establish the vehicle had been seized. Secondly, even if the first part of sub-section (4), to use the words of Ong J. leaves the Court with no option, it is clear from the words I have underlined that the direction is to make either an order for forfeiture or for